

**STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION**

In the Matter of:)	
)	
)	
MARISELA ORNELAS, d/b/a)	
VISION MOBILE HOME PARK, LLC,)	No. WQCC 21-04 (CO)
)	
Respondent.)	
)	

**NEW MEXICO ENVIRONMENT DEPARTMENT’S MOTION FOR AN EXPEDITED
HEARING AND SUMMARY PROCEDURE**

COMES NOW, the Ground Water Quality Bureau (“Bureau”) within the Water Protection Division of the New Mexico Environment Department (“Department” or “NMED”), pursuant to 20.1.3.11(A) and (B) NMAC of the New Mexico Water Quality Control Commission (“WQCC”) Adjudicatory Procedures, and respectfully submits this Motion for An Expedited Hearing and Summary Procedure in preparation for the Administrative Compliance Order hearing scheduled before the Commission for June 8, 2021.

As set forth below, Respondent’s Answer and Request for Hearing has not asserted any viable affirmative defenses, nor has Respondent raised any questions of material fact that would bring the allegations in the Administrative Compliance Order (“2021 ACO”) into question. The Department’s Identity of Witnesses and List of Exhibits, Amended Exhibit List, associated exhibits, and this Motion clearly establish the factual allegations in the 2021 ACO by a preponderance of evidence. Therefore, the Department is entitled to a favorable summary decision as a matter of law. A full evidentiary hearing in this matter is not necessary and would not be a good use of WQCC time and resources; nor would it result in a different outcome.

Therefore, the Department respectfully requests that, pursuant to 20.1.3.22(A)(2) NMAC, the Hearing Officer conduct an expedited hearing, and that, pursuant to 20.1.3.22(A)(1) NMAC, the WQCC decide this matter solely on legal arguments presented in written briefs and oral arguments.

I. PROCEDURAL BACKGROUND

1. The 2021 ACO (filed January 8, 2021) is incorporated herein by reference.
2. On January 8, 2021, the Department issued a press release announcing the 2021 ACO, that was issued due to Respondent's history of non-compliance, which poses an ongoing threat the human health and the environment. [NMED Exhibit 16].
3. On February 9, 2021, Respondent timely filed an Answer and Request for Hearing in response to the 2021 ACO.
4. On April 13, 2021, the WQCC set a hearing for June 8, 2021, on the 2021 ACO.
5. The Bureau has unsuccessfully tried to settle this matter with Respondent, who has not pursued settlement in good faith.

II. THE DEPARTMENT IS LIKELY TO SUCCEED ON THE MERITS AT HEARING

A. The Evidence Offered by the Department Establishes the Allegations of the 2021 ACO by a Preponderance of Evidence

6. The Standard of Decision in this matter is that "[e]ach matter of controversy shall be determined upon a preponderance of the evidence." 20.1.3.20(C)(5) NMAC.
7. The exhibits filed (NMED Exhibits 1 through 17) with the Department's Identity of Witnesses and List of Exhibits (filed May 20, 2021) and Amended Exhibit List (filed May 24, 2021), establish the factual allegations in the 2021 ACO by a preponderance of evidence.

B. Violation 1 of the 2021 ACO

8. Violation 1 of the 2021 ACO states that

[p]ursuant to NMSA 1978 Section 74-6-10(A), NMED concludes that Respondent failed to complete the requirements of the March 13, 2012 settlement agreement and has violated Condition 10 of DP-1691 by failing to submit to NMED a plan to connect Vision Mobile Home Park to the [Valley Water and Sanitation District (“VWSD”)] sewer or provide to NMED documentation illustrating that connection to the VWSD sewer would be financially infeasible. NMED concludes that Respondent has repeatedly refused to comply with the Act and Regulations, evincing a degree of willfulness and negligence. She has control over the events constituting the violation but has dismissed numerous directives and opportunities to come into compliance.”

9. Section 74-6-10(A) of the Water Quality Act provides that “[w]hen, on the basis of any information, a constituent agency determines that a person violated or is violating a requirement, regulation or water quality standard adopted pursuant to the Water Quality Act or a condition of a permit issued pursuant to that act, the [Department] may . . . issue a compliance order requiring compliance immediately or within a specified time period or issue a compliance order assessing a civil penalty, or both.”

10. Condition 10 of DP-1691 required Respondent to:

Within 60 days following the effective date of this Discharge Permit (**by June 7, 2020**), the permittee shall submit a plan for connecting to the VWSD sewer to NMED. The plan shall include, at minimum, documentation on the funding sought/obtained for connection, a timeline for connection, construction benchmarks to be met, and a protocol for reporting progress toward connection. The timeline in the plan shall have a project completion date of no later than April 8, 2022 . . . [and] If the permittee believes the plan is financially infeasible, the permittee shall provide evidence of hardship in the form of tax documents or other reliable records along with the plan submittal within 60 days following the effective date of this Discharge Permit (**by June 7, 2020**).

[NMED Exhibit 12 at p. 10] (emphasis in original).

11. The 2012 Settlement Agreement required Respondent to install monitoring wells in accordance with DP-1691. [NMED Exhibit 5 at p. 8]. As of the date of filing this Motion,

Respondent has not installed the monitoring wells required by the 2012 Settlement Agreement.

12. Respondent received the renewed DP-1691 and signed a certified mail receipt for the permit on April 22, 2021, and cannot plausibly claim that Respondent was unaware of the conditions of DP-1691. [NMED Exhibit 19].

13. As set forth in the 2021 ACO and as the exhibits in this matter prove, Respondent has a history of non-compliance with the Water Quality Act and associated regulations, and DP-1691, going back to at least 2011. [NMED Exhibits 3, 5, 7-8, 11, 13, and 18].

14. In Respondent's Answer and Request for Hearing, there is no explanation why Respondent has not cured their non-compliance. Instead, Respondent admits that the only actions taken were "telephone calls to Department employees [that] indicated her plan and the financial infeasibility of connection to the Valley Sewer System." [Resp. Answer at 10]. Respondent concludes by stating that "[a]n offer of proof is made to this effect and will be documented in a Supplemental Answer." [Id.]. As of the date of the filing of this Motion, Respondent has not filed the promised Supplemental Answer.

15. The Department's Exhibits 3, 5, 7-8, 11-13, and 18-19 establish Violation 1 by a preponderance of evidence. Respondent's Answer and Request for Hearing does not bring any of the material facts regarding Violation 1 into question.

C. Violation 2 of the 2021 ACO

16. Violation 2 of the 2021 ACO states that "[p]ursuant to NMSA 1978 Section 74-6-10(A), NMED concludes that Respondent has violated Condition 5 of DP-1691 by failing to submit quarterly monitoring reports to NMED in accordance with the requirements of DP-1691."

17. Respondent received the renewed DP-1691 and signed a certified mail receipt for the permit on April 22, 2021, and cannot plausibly claim that Respondent was unaware of the conditions of DP-1691. [NMED Exhibit 19].
18. In Respondent's Answer and Request for Hearing, Respondent answers Violation 2 by directing the Commission to "Exhibit B," and promises that "[a]dditional lab reports are coming 2/8/2021." [Resp. Answer at 11]. Respondent's Exhibit B consists of (1) invoices and related documents from Roto Rooter regarding septic tank pumping; (2) invoices from R. A. Biel Plumbing and Heating for gas furnace repairs on mobile homes; (3) "Quarterly Water Usage Reports" for Vision Mobile Home Park for the years 2019 and 2020; and (4) affidavit by Respondent, dated January 30, 2021, authorizing Charles Patton as Vision Mobile Home Park's "Vice President of Compliance." [NMED Exhibit 17]. None of these documents are the required monitoring reports.
19. In the Answer, Respondent offers no explanation why Respondent has not cured their non-compliance regarding the submission of monitoring reports. Instead, Respondent again claims that their non-compliance is not due to Respondent's inaction, but rather that the fault actually lies with the Department for not sending mail to the right address; and in the case when the Department did send mail to the right address, Respondent's attempts to comply were "thwarted by professionals taking money and not doing services." [Resp. Answer at 11]. Again, Respondent concludes by stating that "[a]n offer of proof is made to this effect and will be documented in a Supplemental Answer." [Id.]. As of the date of the filing of this Motion, Respondent has not filed the promised Supplemental Answer.
20. The Department's Exhibits 12 and 19 establish Violation 2 by a preponderance of the

evidence. Respondent's Answer and Request for Hearing does not bring any of the material facts regarding Violation 2 into question.

D. Respondent's Affirmative Defenses Fail as a Matter of Law

21. Respondent offered no viable affirmative defense in their Answer and Request for Hearing. Respondent invoked the affirmative defenses of *estoppel*, *laches*, *waiver*, and *unclean hands*; but all four of these defenses fail as a matter of law. The entirety of Respondent's argument in support of these defenses is as follows:

Generally, the Department knew in many cases that Respondent did not receive documents or that it had received communications from Respondent, the Department asserted it would act in a manner subject to those facts, despite Respondent not knowing the facts as the Department knew those facts and that when the Department acted in facts not known to Respondent, Respondent relied on the Department to its Detriment. All the above acts as affirmative defenses of laches, waives the government's right to issue the order and penalties as indicated and exhibits that the Department had unclean hands in the administration of its duties.

[Resp. Answer at 5].

22. *Estoppel* cannot be invoked by an individual to defend a private right against a lawful action undertaken by a state agency, so Respondent's defense on this point fails as a matter of law. See Silver City Consol. Sch. Dist. No. 1 v. Bd. of Regents of N.M. W. College, 1965-NMSC-035, ¶ 11, 75 N.M. 106 (holding that "estoppel in its usual sense is not generally applicable against a sovereign in the exercise of governmental functions, but where right and justice demand it, the doctrine will be applied, particularly where, as here, the controversy is between a public agency and a governmental subdivision") (internal citations and quotation marks omitted) (emphasis added).
23. *Laches* cannot be invoked to bar a state agency from enforcing a public right or protecting a public interest, so Respondent's defense fails on this point as a matter of law.

See *State ex rel. Dep't of Human Servs. v. Davis*, 1982-NMSC-139, ¶4, 99 N.M. 138 (holding that “when a sovereign institutes a suit to enforce a public right or protect a public interest, laches cannot be set up as a bar . . . [and] [t]he tardiness of public officers in the performance of duties enjoined upon them by statutes cannot be entertained as a defense to an action by the state to enforce a public right or to protect public interests.”) (internal citations and quotation marks omitted).

24. Respondent offers no legal authority to support the invocation of the defense of *waiver*.

Instead, Respondent argues that the “affirmative defenses of laches, waives the government’s right to issue the order and penalties.” [Resp. Answer at 5]. Since *laches* fails as a matter of law in this matter, it cannot waive the Department’s statutory and regulatory duties to enforce legally binding provisions of the Water Quality Act and associated regulations.

25. Respondent offers no legal authority to support the invocation of the defense of *unclean hands*.

Instead, Respondent implausibly argues that because “the Department knew in many cases that Respondent did not receive documents or that it had received communications from Respondent . . . Respondent relied on the Department to its Detriment . . . and exhibits that the Department had unclean hands in the administration of its duties.” These claims are false. The Department has a statutory duty to enforce violations of the Water Quality Act and has engaged in extensive communications with Respondent in repeated attempts to help Respondent come into compliance with the Conditions of DP-1691. [NMED Exhibit 11]. Respondent’s invocation of the defense of *unclean hands* fails as a matter of law. See *Home S&L Ass’n v. Bates*, 1966-NMSC-167, ¶ 10, 76 N.M. 660 (stating that the doctrine of *unclean hands* “is based upon public

policy and means simply that courts of equity will not lend their aid to anyone seeking their active interposition, who has been guilty of fraudulent, illegal or inequitable conduct in the matter with relation to which he seeks relief.”) (internal citations and quotation marks omitted).

26. The 2021 ACO seeks to enforce violations to the renewed DP-1691, which was issued on April 8, 2020. Respondent’s arguments that the 2021 ACO (issued less than one year after the renewal of DP-1691) is unenforceable because the Department slept on its rights are incorrect. In addition, the 2012 Settlement Agreement remains in effect until Respondent comes into full compliance – something that has not yet happened.

27. There is no statute or regulation establishing a time-bar (or “statute of limitation”) that limits when the Department can commence enforcement against violations of the Water Quality Act and associated regulations.

28. Furthermore, Bureau staff had been in regular contact from 2018 to 2020 with Respondent to assist in bringing Respondent into compliance. [NMED Exhibit 11]. Respondents bad-faith assertion of implausible affirmative defenses should not stand.

III. RESPONDENT’S HISTORY OF NON-COMPLIANCE

29. On October 31, 2011, the Department issued an Administrative Compliance Order against Respondent for multiple, unaddressed violations of the Water Quality Act and associated regulations. [NMED Exhibit 3].

30. On March 8, 2012, Respondent entered into a settlement agreement with the Department that included civil fines, reduced on the condition of adhering to the requirements of the pending discharge permit. [NMED Exhibit 5].

31. Respondent discharged without a permit until October 29, 2012, when the Department

issued DP-1691 to Respondent. [NMED Exhibit 6].

32. On October 29, 2017, Respondent's discharge permit, DP-1691, expired. Despite the Bureau's two documented phone calls (June 11, 2019, and February 29, 2020) and three e-mail strings (September 28, 2018, through October 5, 2018; February 11, 2019, through March 4, 2019; and July 27, 2019, through August 5, 2019) with Respondent, including discussions with a consultant, Respondent did not submit an application for a renewal of DP-1691. [NMED Exhibit 11].

33. Respondent discharged without a permit from October 29, 2017, to April 8, 2020.

34. On January 22, 2019, the Department issued a Notice of Non-Compliance ("2019 NONC"), for egregious violations of the Water Quality Act, 20.6.2 NMAC, and the Stipulated Final Order and Settlement Agreement. [NMED Exhibit 8]. The 2019 NONC re-imposed the \$5,000 civil fine assessed in the 2012 settlement agreement because, contrary to DP-1691, (1) the Respondent never installed the three monitoring wells, and (2) the Respondent submitted some required monitoring reports that were incomplete and failed to submit other required monitoring reports at all. The 2019 NONC required Respondent to apply for a discharge permit renewal for DP-1691, install three monitoring wells, perform semi-annual groundwater sampling, install a water meter on the facility's water supply, and inspect each septic tank for scum and solids. The 2019 NONC also offered Respondent an alternative route to compliance by connecting Vision Mobile Home Park to the VWSD sewer. [Id.]

35. On April 8, 2020, the Department re-issued DP-1691 to Respondent for Vision Mobile Home Park. Condition 10 of DP-1691 required that Respondent submit to the Department a plan to connect Vision Mobile Home Park to the VWSD sewer within 60 days

following the effective date DP-1691 (on or before June 7, 2020) or submit documentation illustrating why connection was infeasible. Renewed DP-1691 required the plan to include, at a minimum, documentation on the funding sought/obtained for connection, a timeline for connection, construction benchmarks to be met, and a protocol for reporting progress toward connection, with a project completion date of no later than April 8, 2022.

36. As of the date this Motion was filed, Respondent has not fulfilled the requirements of Condition 10 of DP-1691, despite repeated attempts by the Bureau to contact Respondent to encourage awareness of the submission requirements of Condition 10 - including providing a preliminary draft via email for review on December 19, 2019, mailing the final issued permit by certified mail #7017-3040-0000-4183-7144 on April 17, 2020, and by providing an electronic copy of the final issued permit via email on April 22, 2020. The Bureau's communications encouraged the Respondent to carefully review the document and contact NMED with any questions. [NMED Exhibits 11, 18 and 19].
37. As of the date of filing of this Motion, Respondent still has not paid the permit fees due for the renewal of DP-1691, which was issued over one year ago on April 8, 2020.
38. The Bureau has recently become aware that Respondent has very similar history of non-compliance issues in Colorado, namely, numerous discharge permit violations at a mobile home park owned by Respondent resulting in thirty thousand dollars (\$30,000.00) in civil penalties, all of which remain unpaid. [NMED Exhibit 14].
39. On July 23, 2020, the Bureau issued a Notice of Violation to Respondent for violations of Condition 10 of the DP-1691, on the grounds that the Bureau had not received a plan from Respondent to connect to the VWSD sewer or documentation illustrating that

connection to the VWSD sewer would be financially infeasible. The second Notice of Violation informed Respondent that to correct the violation of Condition 10, Respondent was required to submit either a plan for connection or documentation illustrating the financial infeasibility of sewer connection within 10 days following the date of the second Notice of Violation, on or before August 2, 2020.

40. As of the filing of this Motion, Respondent has neither submitted to the Bureau a plan to connect to the VWSD sewer, nor documentation illustrating that connection to the VWSD sewer would be financially infeasible.
41. As of the filing of this Motion, Respondent has not submitted any of the quarterly monitoring reports required as Condition 5 of DP-1691. In addition, to date, other than to file an application to renew DP-1691, Respondent has not taken any of the actions required in the 2019 NONC.
42. Respondents Answer and Request for Hearing does not raise any controversy regarding the factual allegations in Paragraphs 29-34, 36-37, and 39 above. Instead, Respondent implausibly claims that communications from the Department were never received, makes repeated promises that some type of “lab results” would be forthcoming on February 28, 2021, and that proof of Respondent’s compliance efforts would be provided to the WQCC in a Supplemental Answer. As of the filing of this Motion, Respondent has not provided the promised lab results or Supplemental Answer.
43. Respondent’s history of non-compliance in New Mexico and Colorado, Respondent’s misapplied defenses to the allegations of the 2021 ACO, and Respondent’s failure to secure a settlement of this matter raises serious doubt that compliance with the conditions of DP-1691 will ever be met.

IV. AN EXPEDITED HEARING AND SUMMARY DECISION IS APPROPRIATE

44. Pursuant to 20.1.3.22(A)(2) NMAC, if the Hearing Officer determines that this Motion “has a likelihood of success and could fairly expedite the resolution of the proceeding, the hearing officer may submit a recommended decision to the commission based on briefs and oral arguments presented at an expedited hearing.”
45. Pursuant to 20.1.3.22(A)(1) NMAC, the WQCC “may dispose of . . . [a] request for compliance order hearing after an expedited hearing if a party requests that the matter be decided solely on legal arguments presented in written briefs and oral arguments.”
46. This Motion establishes Violations 1 and 2 of the 2021 ACO by a preponderance of the evidence. Respondent has not raised an actual challenge to any material fact with regard to Violations 1 and 2. Respondent’s affirmative defenses fail as a matter of law, and Respondent has offered little more than excuses for non-compliance, essentially blaming the Department and others for the violations. Respondent offers no acknowledgement of the seriousness of the violations, nor does Respondent commit to coming into compliance with the conditions of DP-1691.
47. The Department is entitled to a summary decision as a matter of law. See *Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 8, 148 N.M. 713 (stating that in New Mexico summary decisions are appropriate “where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. Where reasonable minds will not differ as to an issue of material fact, the court may properly grant summary judgment. All reasonable inferences are construed in favor of the non-moving party.”) (internal citations and quotation marks omitted).
48. Because the Department is entitled to a summary decision as a matter of law, a full

evidentiary hearing would not be a good use of WQCC time and would have no real probative value. An expedited hearing would give both Parties an opportunity to address the Hearing Officer and the WQCC, who will have the opportunity to question the Parties.

49. The hearing in this matter has been properly noticed and no additional notice is required for an expedited hearing.

50. The Respondent opposes this Motion.

V. CONCLUSION

For the reasons set forth above, the Department respectfully requests that the Hearing Officer conduct an expedited hearing, and that the WQCC decide this matter solely on legal arguments presented in written briefs and oral arguments.

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CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2021, a true and accurate copy of this Motion for an Expedited Hearing and Summary Procedure was served by email on Respondent at the following addresses:

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